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Nos. 64 and 65

In the Supreme Court of the United States

October Term, 1961

FOAD, FOO AND EDDIE KAUFF, PETITIONERS

v.

UNITED STATES OF AMERICA

STANDARD OIL PRODUCTS CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional provision, statute, and rule involved	3
Statement	3
1. The indictment and opening statement	4
2. Palliotto's testimony	6
3. The court's suggestion that the prosecution be abandoned	9
4. Rosenholm's testimony	4
5. Rosenholm's change of testimony as to a date	15
6. The motions for acquittal	17
7. The judgment of acquittal	20
Summary of argument	23
Argument	27
I. The judgment of acquittal was void as in excess of the court's power	27
A. Except where the government acknowledges that it cannot or does not propose to prove a fact deemed by the court essential to conviction, a court is without power to enter a judgment of acquittal until it has heard the evidence of guilt	29
B. Government counsel's conversation with witness Rosenholm during a recess concerning the accuracy of a point in his testimony, as a result of which the witness corrected his testimony, was not a valid basis for acquittal	37
II. Being a nullity, the acquittal is not a bar to the accused's retrial and was properly ordered vacated	41
A. An invalid judgment of acquittal, precisely because it is a nullity, will not support a plea of *autrefois acquit*	41
B. The judgment was properly ordered vacated by the court of appeals in the exercise of its power under the All Writs Act	55

622480—61——1

Page

Conclusion 61
Appendix 63

CITATIONS

Cases:

Bankers Life & Casualty Co. v. *Holland*, 346 U.S. 379 56
Beacon Theatres v. *Westover*, 359 U.S. 500 56
Best v. *District of Columbia*, 291 U.S. 411 33
Brackney v. *State*, 182 Ind. 343 45
Bradstreet, Ex parte, 7 Pet. 634 57
Brock v. *North Carolina*, 344 U.S. 424 ..... 47, 48
Caldwell v. *United States*, 205 F. 2d 879 38
Calvaresi v. *United States*, 348 U.S. 961 61
Chin Yow v. *United States*, 208 U.S. 8 31
Commonwealth v. *Myers*, 1 Va. Cas. 188 44
Commonwealth v. *Peters*, 53 Mass. (12 Met.) 387 ..... 44, 49
Cooke v. *United States*, 267 U.S. 517 ..... 37, 61
Crawford v. *State*, 174 Md. 175 44
De Beers Consolidated Mines v. *United States*, 325 U.S. 212 56
Diaz v. *United States*, 223 U.S. 442 44
Dreyer v. *Illinois*, 187 U.S. 71 47
Fahey, Ex parte, 332 U.S. 258 56
Frank v. *Mangum*, 237 U.S. 309 31
Frankel v. *Woodrough*, 7 F. 2d 796 57
Fraser v. *United States*, 233 F. 2d 1 40
Gori v. *United States*, 367 U.S. 364 ..... 25, 37, 38, 42, 47, 48, 49, 50
Green v. *United States*, 355 U.S. 184 ..... 48, 53
Harding, Ex parte, 219 U.S. 363 56
Insurance Co. v. *Comstock*, 16 Wall. 258 57
Japanese Immigrant Case, The, 189 U.S. 86 31
Jencks v. *United States*, 353 U.S. 657 38
Keerl v. *Montana*, 213 U.S. 135 47
Kendall v. *United States*, 12 Pet. 524 57
Kepner v. *United States*, 195 U.S. 100 47
King, The v. *Davis*, 12 Mod. 8, 88 Eng. Rep. 1129 45
King, The v. *Taylor*, 3 B. & C. 612, 107 Eng. Rep. 860 45
Kwock Jan Fat v. *White*, 253 U.S. 454 31
La Buy v. *Howes Leather Co.*, 352 U.S. 249 ..... 56, 60, 61
Liverpool Steamship Co. v. *Commissioners of Emigration*, 113 U.S. 33 33

Cases—Continued

	Page
Logan v. *United States*, 144 U.S. 263	47
Lovato v. *New Mexico*, 242 U.S. 199	47
McClellan v. *Carland*, 217 U.S. 268	57
McDermott v. *Commonwealth*, 30 Ky. L. Rep. 1227	45
McGuire v. *United States*, 152 F. 2d 577	33
McGuire v. *United States*, 273 U.S. 95	25, 38
Maryland v. *Soper* (*No. 1*), 270 U.S. 9	57
Metropolitan Water Co., Ex parte, 220 U.S. 539	56
Mitchell v. *Youell*, 130 F. 2d 880	44
Morgan v. *United States*, 298 U.S. 468	31
Napue v. *Illinois*, 360 U.S. 264	40
National Labor Relations Board, In re, 304 U.S. 486	56
Northern Pacific Railway Co., Ex parte, 280 U.S. 142	56
Offutt v. *United States*, 348 U.S. 11	37, 61
Oscanyan v. *Arms Co.*, 103 U.S. 261	33
Palko v. *Connecticut*, 302 U.S. 319	46
Paulsen v. *People*, 195 Ill. 507	44
Pennsylvania Co., In re, 137 U.S. 451	57
People ex rel. Hillman v. *Hull*, 131 N.Y. Misc. 253	44
Peru, Ex parte, 318 U.S. 578	56
Peterson, Ex parte. 253 U.S. 300	56
Price v. *State*, 104 Miss. 288	45
Regina v. *Middlesex Justices* (*Ex parte Director of Public Prosecutions*), [1952] 2 All Eng. Rep. 312, [1952] 2 Q.B. 758	51, 52, 53, 54
Rex v. *Bear*, 2 Salk. 646, 91 Eng. Rep. 547	45
Rex v. *Fursey*, Sayer, 90, 96 Eng. Rep. 813	45
Roche v. *Evaporated Milk Association*, 319 U.S. 21	26, 56, 57
Sacher v. *United States*, 343 U.S. 1	37
Simmons v. *United States*, 142 U.S. 148	47, 48
Skinner & Eddy Corporation, Ex parte, 265 U.S. 86	56
Slater v. *Commonwealth*, 239 Ky. 620	44
State v. *Green*, 16 Iowa 239	45
State v. *Hodgkins*, 42 N.H. 474	44
State v. *Howell*, 220 S.C. 178	44, 45
State v. *Keerl*, 33 Mont. 501, affirmed *sub nom. Keerl* v. *Montana*, 213 U.S. 135	47
State v. *Ketchum*, 112 Ark. 68	45
State v. *Odell*, 4 Blackf. (Ind.) 156	44

Cases—Continued Page
State v. *Rother*, 130 Mont. 357 44
State v. *Swepson*, 79 N.C. 632 45
Stratton v. *St. Louis Southwestern Railway Co.*, 282 U.S. 10 56
Strobhar v. *State*, 88 Fla. 167 44
Struthman v. *United States*, 67 F. 2d 521 33
Thompson v. *United States*, 155 U.S. 271 47
United States Alkali Association v. *United States*, 325 U.S. 196 56
United States v. *Ball*, 163 U.S. 662 ..... 44, 48, 49
United States v. *Dietrich*, 126 Fed. 676 ..... 33, 34
United States, Ex parte, 242 U.S. 27 56
United States Ex parte, 287 U.S. 241 ..... 26, 43, 56, 57, 58, 59
United States, Ex parte, 101 F. 2d 870, affirmed *sub nom.* *United States* v. *Stone*, 308 U.S. 519 57
United States v. *Gori*, 282 F. 2d 43, affirmed, 367 U.S. 364 ..... 25, 42
United States v. *Heath*, 260 F. 2d 623 38
United States v. *Malmin*, 272 Fed. 785 59
United States v. *Maryland Cooperative Milk Producers*, 145 F. Supp. 151 33
United States v. *Perez*, 9 Wheat. 579 47
United States v. *Smith*, 331 U.S. 469 56
United States v. *Thompson*, 251 U.S. 407 43
United States v. *United States District Court*, 238 F. 2d 713, certiorari denied *sub nom.* *Valley Bell Dairy Co.* v. *United States*, 352 U.S. 981 ..... 57, 59
United States v. *Weissman*, 266 U.S. 377 ..... 34, 35
Virginia v. *Paul*, 148 U.S. 107 ..... 56, 57
Virginia v. *Rives*, 100 U.S. 313 56
Wade v. *Hunter*, 336 U.S. 684 ..... 25, 41, 47
Zakonaite v. *Wolf*, 226 U.S. 272 31

Constitution, statutes, and rule:
United States Constitution, Fifth Amendment 3
18 U.S.C. 371 3
18 U.S.C. 1001 3
18 U.S.C. 3500(d) 38
18 U.S.C. 3731 ..... 56, 58
28 U.S.C. 1291 58
28 U.S.C. 1651(a) 3, 55
Federal Rules of Criminal Procedure, Rule 29(a) 3, 32

Miscellaneous:

	Page
American Law Institute, *Administration of the Criminal Law* (Double Jeopardy) (1935)	44, 45
Archbold, *Criminal Pleading, Evidence & Practice* (34th ed., 1959) § 438	44
9 Bacon's Abridgment (1852 ed.)	45
1 Bishop, *Criminal Law* (9th ed., 1923)	44, 45
Black's Law Dictionary (3d ed.)	30, 43
4 Blackstone, *Commentaries* (Lewis ed., 1900)	44
1 Chitty, *Criminal Law* (5th Am. ed., 1847)	44, 45
Clark, *Criminal Procedure* (2d ed., 1918)	45
3 Greenleaf, *Evidence* (16th ed., 1899), § 38	45
2 Hawkins, *Pleas of the Crown* (6th ed., 1787), ch. 35, § 1	44
H. Rep. No. 45, 77th Cong., 1st Sess	60
2 Russell, *Crimes and Misdemeanors* (7th ed., 1910)	44

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No. 64

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OPINIONS BELOW

The opinion of the court of appeals (R. 45–59) and concurring opinion of Circuit Judge Aldrich (R. 59–65) are reported at 286 F. 2d 556–568.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1961 (R. 65). By orders entered on

February 27 and 28, 1961, Mr. Justice Frankfurter extended the time for filing petitions for writs of certiorari to and including March 15, 1961 (R. 66–67). The petitions were filed on March 7, 1961, and were granted on June 19, 1961 (R. 67–68; 366 U.S. 959). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the power of the trial court to acquit defendants who are properly before it is absolute.

2. Whether, if the power of the trial court to acquit defendants who are properly before it is not absolute, but is subject to limits, the trial court exceeded those limits where it directed the jury to return verdicts of acquittal before the government had completed presentation of its proof of guilt—for one or both of the following reasons:

(a) The prosecutor had spoken privately to a witness during an overnight recess as a result of which the witness had corrected a point in his testimony.

(b) In the court's judgment evidence theretofore offered by the government was not subject to belief.

3. Whether, if the trial court acted in excess of its power, the accused may be retried without violating the constitutional prohibition against double jeopardy.

4. Whether, if the trial court acted in excess of its power and retrial is not barred by the Constitution, the court of appeals had authority under the All Writs Act, by mandamus, to order the district court to vacate the judgment of acquittal and reassign the case for trial.

CONSTITUTIONAL PROVISION, STATUTE, AND RULE INVOLVED

The Fifth Amendment provides in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

Section 1651(a) of Title 28 of the United States Code provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Rule 29(a) of the Federal Rules of Criminal Procedure provides in pertinent part:

> * * * The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

STATEMENT

Petitioners, Standard Coil Products Co., Inc., and two of its employees, Fong Foo and Robert Knupp, were indicted on January 15, 1960, for concealing and conspiring to conceal material facts in a matter within the jurisdiction of an agency of the United States, in violation of 18 U.S.C. 1001 and 371 (R. 6–23). On September 20, 1960, during petitioners'

623460—61——2

trial in the United States District Court for the District of Massachusetts, the trial judge, on petitioners' motions, and prior to the completion of the government's presentation of its evidence in chief, directed the jury to return verdicts of acquittal (R. 559, 572, 575–576). On the following day the trial court entered a formal judgment of acquittal (R. 37). Thereafter, the government filed a motion to vacate the judgment of acquittal as having been entered without authority, which motion was denied without opinion by the trial court (R. 5, 38–39).

On November 3, 1960, the government filed in the Court of Appeals for the First Circuit a petition for a writ of mandamus directing the vacation of the judgment and the reassignment of the case for trial (R. 1–6). Petitioners intervened in this proceeding (R. 39–40). On February 2, 1961, the court of appeals (with a concurring opinion by Judge Aldrich) granted a writ of mandamus directing the district court to vacate the judgment of acquittal and reassign the case for trial (R. 45–65). The order directed that the new trial be before another judge.

The circumstances leading to the entry of the judgment of acquittal were:

1. THE INDICTMENT AND OPENING STATEMENT

The indictment (R. 6–23) charged in nine counts that, beginning in September 1956 and continuing until November 1957, the defendants had conspired to defraud and defrauded the United States by circumventing and falsifying procedures prescribed for testing radiosondes which the corporate petitioner, Stand-

ard Coil, manufactured under contracts with the Army Signal Supply Agency. Radiosondes are electronic devices for furnishing weather information. They are designed to be dropped from airplanes and, while floating to earth by parachute, to transmit continuous radio signals in Morse code indicating the temperature, pressure and humidity of the air through which they pass (R. 7, 92–93, 98–100). The charges involved two contracts and four different tests (R. 6–8, 12–13). Three of the tests were designed to determine the accuracy of the radiosondes with respect to temperature, pressure and humidity, respectively, and the fourth—called the "shock" test—was to check the extent to which the accuracy of the devices in those respects was impaired after being subjected to shocks similar to those they would undergo when their parachutes would open in actual use (R. 7–8, 13; see R. 72, 225). Counts 1–4 charged substantive falsifications with respect to the temperature, pressure, humidity and shock tests, respectively, under one contract (R. 6–12). Counts 5–8 charged like offenses under the other contract (R. 12–17) and count 9 charged a conspiracy to commit the substantive offenses (R. 17–23).

Prior to trial each of the petitioners moved separately to dismiss the indictment (R. 26–27). The court denied the motions (R. 26–27). It granted in part motions for production of documents and bills of particulars (R. 26–27).

In his opening statement to the jury (R. 69–74), government counsel explained the general nature of the charges of the indictment. He stated that the government would present its evidence in two parts—the first part to be evidence explanatory of the instruments involved and the procedures for testing them, and the second part, evidence of the defendants' deliberate falsification of the tests. "Before you can follow the testimony about the falsification of the tests," as counsel explained to the jury, "you will have to know something about the instrument involved, how it was made and how it was to be tested" (R. 70).

2. PALLIOTTO'S TESTIMONY

The government's second witness[1] was Constanz Palliotto,[2] an inspector of electronic equipment for the Army Signal Supply Agency (R. 79). He had been stationed at the corporate petitioner's plant between September 1956 and April 1958 for the purpose of supervising the testing of the radiosondes (R. 81). Pursuant to arrangements of counsel which had been approved by the court, the government planned to call Palliotto twice, first to testify as to "explanatory" matters only and later in the trial to testify as to specific acts of fraud (R. 80, 94, 238, 362–363, 365, 480). (He in fact was never called as a "fraud"

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[1] The testimony of the first witness, who briefly identified certain documentary exhibits (see R. 75–58), has no present relevance.

[2] We shall follow the spelling of this witness's last name as it usually appears in the record. On occasion the reporter spelled it "Paliotto."

witness, as a consequence of the entry of the judgment of acquittal before the government had the opportunity to call him a second time.)

Palliotto explained what radiosondes are, how they operate and the functions of their constituent parts; the physical layout of the plant at which radiosondes were produced; and the procedures whereby they were to have been tested and the results of the tests reported to him as the government's "Quality Assurance Representative" (R. 81–358, 365–480). Due to the subject matter of his testimony, Palliotto's explanations were largely technical in character. The trial court, in order to understand the testimony and to assist the jury in understanding it, participated very extensively in the interrogation of the witness.[3] The judge frequently expressed impatience with the witness for his inability to express himself more clearly (*e.g.*, R. 101, 102, 116, 117, 122, 125, 130, 136, 140, 141, 145), criticized his choice of language (*e.g.*, R. 91, 96, 111–112, 115, 116, 117, 123, 130, 140, 141, 145, 157, 158, 165–166, 187, 196, 231–232, 237, 239, 240–241, 271, 306, 315, 418) and on several occasions appeared to ridicule him (R. 144, 184, 246, 283, 294, 306, 315, 418, 478)—in particular, for his erroneous use in one instance of the word "spurious" (R. 135–136, 144, 246, 283, 315)[4] and for what the court thought was a

[3] As noted by the court of appeals, "An examination of the record shows that while this witness was on direct examination he was asked fully as many questions by the judge as by the Assistant United States Attorney" (R. 47).

[4] The witness used this term to signify "instantaneous," apparently in the belief that it was derived from the phrase "spur of the moment" (R. 135–136).

"strange misuse" of the word "virgin" (R. 144, 184, 294, 361).[5] As the examination of the witness proceeded, the court began to admonish him to be careful in his statements since he was testifying in a criminal case (R. 158, 161, 166, 199, 226, 271, 313, 314, 328, 352, 398, 477) and to indicate by questions and occasionally by sharp comments that it considered some of the witness's testimony unworthy of belief (R. 255–256, 268–269, 313–314, 351–352, 357–358, 401–402, 477–478). On several occasions during the witness's

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[5] The witness, in explaining the parts of a radiosonde, stated that each such device contained among its components 36 strands of human hair (R. 143). Thereafter, the following colloquy ensued (R. 143–144):

"Q. How long are these hairs conditioned in the chamber?

"A. Not less than 6 hours.

"The COURT. Not that it probably has any significance, but are they strands of men's or women's?

"The WITNESS. Mostly women's.

"The COURT. Do they all have to come from the same woman or can you pluck one one day and one another?

"The WITNESS. All I know is that they have to be virgin hair.

"The COURT. What? [Laughter.] What do you mean by 'virgin hair'? It certainly doesn't mean what it sounds like.

"The WITNESS. That is hair that has not been subjected to dyes or any cosmetics, and so forth.

"The COURT. You mean hair in its natural state?

"The WITNESS. Yes.

"The COURT. It has nothing to do with being a virgin?

"The WITNESS. No, sir.

"The COURT. All right. Does it have anything to do with the age of the person?

"The WITNESS. I can't answer that, sir.

"The COURT. This is the most spurious virgin hair that—I would like to know, really, what it is that you are describing. Is it the hair of a child?

[Cont'd. on next page.]

testimony, the court also reprimanded government counsel for acts and statements which it considered objectionable (R. 169, 197–198, 203, 262).*

3. THE COURT'S SUGGESTION THAT THE PROSECUTION BE ABANDONED

In the course of cross-examination Palliotto was asked whether he had destroyed notes or records of

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"The WITNESS. I couldn't tell you the answer, sir, whether it would be child's hair or a young lady's or an old lady's. That is something that would have to be answered by engineers that specialize in that particular field.

"The COURT. I have recently seen some witch doctors in Ghana and Nigeria but I must say nothing they offered in the way of juju was any more mysterious than your leaving this hair. I can't tell whether it is like the monkey's skull——

"The WITNESS. It is human being hair, mostly women's.

"The COURT. You don't know anything about it?

"The WITNESS. No, all I know, at the present time we are having difficulty procuring.

"The COURT. There are plenty of women but maybe not plenty that meet your description, but I don't know."

Subsequently, in referring to the witness's "strange misuse of language," the court incorrectly quoted Palliotto as having said "virgin women's hair" (R. 361).

* The principal incident involved counsel's reply to a question by a defense attorney as to whether the government claimed that any "particular tape" (on which radiosonde signals were recorded) or "data sheet" was false. Counsel stated that the government did not claim that any particular tape or data sheet was false but that it did claim and would prove that all test results submitted to the government inspector were "permeated" with fraud and that this "couldn't help but * * * produce false test results" (R. 197–198). The court, characterizing counsel's answer as "extravagant" and "unseemly" for stating more than was called for by the question, said that if it had been "delivered to the Jury instead of to the Court, it would be proper to have a mistrial." The court added, however, that it attributed counsel's statement to "inadvertence" (R. 198).

his activities at the plant or tapes which reported the results of tests run on radiosondes. He answered yes and was questioned further as to whether any of the notes, records or tapes had been destroyed following his learning of the commencement of an investigation by the F.B.I. The witness expressed some confusion and difficulty in recollecting the sequence of the various events, and testified initially that he had not destroyed materials after learning of the F.B.I. investigation (R. 245–248, 351–353, 357–358). Upon clarification and development of the exact timing of his first knowledge of the investigation, Palliotto changed his testimony and acknowledged that he had thereafter destroyed documents or notes (R. 352) and tapes (R. 358).[7]

The court thereupon excused the jury (R. 358) and asked government counsel whether there was "any other principal Government witness with respect to the kind of items which have been covered by the witness on the stand" (R. 359). Informed that there was one other, the court asked if his credit would "stand better after examination than this witness' credit." Government counsel said his credit would "be good," and that Palliotto was "just a little confused." (R. 359.) The court replied (*ibid.*):

> A little confused? This has gone on for two or three days. I am going to tell you that if I were the United States Attorney in this case and my principal witness were testifying as this witness has done I would forthwith nol prosse the case.

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[7] Neither the court nor defense counsel took the position, or even suggested, that the destruction of these materials precluded a fair trial.

Government counsel acknowledged that Palliotto's explanations had "not been as clear as they might be," and pointed out to the judge that the witness was testifying only as to "explanatory material"; that he had not been called "at this stage to testify to any matter concerning the fraud"; and that he was not the government's "principal witness by any stretch of the imagination" (R. 359).

Notwithstanding this explanation, the court announced a 15-minute recess to enable the United States Attorney and his assistants to "consider whether the public interest is served by a further prosecution of this case" (R. 359). Following the recess, the court explained to the United States Attorney, who had meanwhile joined his assistants in the courtroom, why he had asked the government to consider whether to "nol pros the case at this stage" (R. 360). Stating that "[a] judge ought not to deceive himself into believing that he knows how a jury will act," the court said that it nevertheless felt "reasonably confident" that there was "no chance whatsoever" that the jury would convict the defendants if conviction required "any credit of Mr. Palliotto" (*ibid.*). The court said it was making "no statement as to whether the defendants are guilty or not guilty" but was considering only the fact that the court and jury were (*ibid.*)—

> presented with the testimony of a man who may intend to tell the truth but seems absolutely incapable of so testifying as to persuade neutral persons that he has a mind with a discriminating capacity to observe, the strength to remember, the skill to narrate, and the total awareness

> of the proceedings in which he, and more particularly the defendants, find themselves.

The court stated that "[i]f it were not so serious a matter, it would be humorous to refer to the kinds of things which this witness has said" (R. 360). It then referred to instances in the witness's testimony which rendered it ambiguous and confusing—including the witness's "humorous blunder" in the use of the word "spurious" and what seemed to the court a "strange misuse" of the word "virgin"[8] (see *supra*, p. 8)—and said that a witness who had "so little understanding of the language" and had "so frequently made utterances which have confused the Court, and I feel certain the Jury" was a "very slender reed on which to make a man's fate depend" (R. 360–361). "[I]f in the end the Jury did believe this witness," the court said (R. 362)—

> I think it would be almost inevitable that I would have to set aside the verdict as not being a verdict * * * based upon evidence beyond a reasonable doubt.

The United States Attorney pointed out that "this witness was called for a limited purpose not central to establishment that wrongdoing had occurred," and that it was the view of the government that, "whatever the Jury's impression of this witness," its verdict as to the defendants' guilt or innocence should rest upon the testimony of witnesses yet to be called, who would testify that "under the instructions of the defendants they did not follow the procedures prescribed [by the

[8] The judge said he thought that the witness's "virgin" reference "did not prejudice" the accused (R. 361).

terms of the contracts] and * * * in fact falsified those procedures" (R. 362). Government trial counsel added that this aspect of the case "could well have proceeded by introduction of the documents, particularly the specification[s], which set forth the test procedures, and then the fraud witnesses could have been called." He explained that he called Palliotto primarily to explain how the testing procedures were supposed to work, in the belief that the jury would thereby be able to understand that aspect of the case better than if the printed documents were merely read to them (R. 362–363). Stating that he "had not anticipated by any stretch of the imagination that [Palliotto's testimony] would take this long,"[*] he told the court that "[t]he fraud witnesses" were present and had been for many days; that the court had "not heard one-tenth of the testimony * * * and none of the fraud testimony"; that it was unnecessary for Palliotto's testimony to be credited "in any degree in order for a conviction to stand," since "the documents * * * sp[oke] for themselves as to the test procedure[s]"; and that for these reasons he felt that he would be "derelict in [his] duty in not proceeding with the case" (R. 363). The United States Attorney joined in these statements of his trial counsel and added (R. 363):

> [T]o draw a conclusion based upon the testimony of this witness would not fairly give the government an opportunity to present to the Court and Jury the evidence on which the

[*] The trial was then in its fifth day (R. 334).

> Grand Jury proceeded in charging these defendants.

The court said that, although it had not intended to suggest that the defendants were innocent, it still felt that, regardless of what testimony other witnesses might give, there was "not * * * a chance" that the jury would convict because "the impression" created in the jurors' minds by Palliotto's testimony was "now ineradicable."[10] Nevertheless the court said it was "going to allow the government to go ahead" (R. 364).

4. ROSENHOLM'S TESTIMONY

The jury was then recalled and the cross-examination of Palliotto proceeded (R. 365–424). Following completion of his testimony and the relatively brief testimony of a third government witness (R. 481–499),[11] the government called its first "fraud" witness, Robert Rosenholm (R. 500).[12] During the pertinent period Rosenholm, an alleged co-conspirator (R. 20–21), had been the "final inspector" of radiosondes for Standard Coil (R. 501–502). As in the case of Palliotto, the court participated extensively in the direct examination of the witness (R. 500–555, 559–566) and was frequently critical of his manner of ex-

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[10] The clerk, asked by the judge if he did not agree with this estimate, replied, "So far" (R. 364).

[11] The third witness was the general manager of the plant where the radiosondes were produced (R. 481). He identified the positions held by the individual petitioners and described the functions they performed.

[12] Rosenholm was the first witness to testify to actual fraudulent activities on the part of the accused (see, *e.g.*, R. 510, 512, 529, 531, 533, 534–535, 537, 561–563).

pressing himself (*e.g.*, R. 518, 522–524, 538, 539–540). Once, on his own initiative, the witness corrected himself as to a certain point just made. He had testified that he used to hand one of the test operators small "cards" on which information relating to the tests was printed (R. 543–546). Explaining that he had been previously "confused" (R. 546), the witness testified that he had given the test operator small "piece[s] of paper" on which he had copied the information from certain charts (R. 546–548). This voluntary change of testimony on direct examination was later referred to by the court (on the occasion of the entry of the judgment of acquittal, see *infra*, p. 23, note 18) as evidencing "either a lamentable lack of memory or an extraordinary power of inventiveness" (R. 575). During this witness's testimony, as during Palliotto's, the court took occasion to rebuke counsel for conduct which it deemed objectionable (R. 533, 535, 543, 549–550).[13]

5. ROSENHOLM'S CHANGE OF TESTIMONY AS TO A DATE

Toward the close of the seventh day of the trial, Rosenholm testified on direct examination to a certain conference at which Standard Coil's outside counsel, a Mr. Teichman, was present (R. 551–555). The witness was "not sure" of the date of the conference (R. 552). Pressed by the court for his best recol-

[13] One incident involved government counsel's pursuit of a line of questioning which the court believed was "in defiance of" a prior ruling (R. 549). Counsel protested that he had not meant to defy the court (*ibid.*). On another occasion the court reproved one of the defense attorneys for the "intimidati[ng]" manner in which, the court thought, the attorney had phrased an objection (R. 543).

lection, he fixed the year as 1958 and said he believed it was in February but was not sure (*ibid.*).[14]

A colloquy then occurred between court and counsel as to whether the corporate petitioner had a right under the attorney-client privilege to object to the admission of statements made to Mr. Teichman at this conference by corporate personnel (R. 555–557). Government counsel stated that the government proposed to prove that at that conference Mr. Teichman, an agent of the company, was apprised of the fraudulent activities that were "going on" at the plant; that thereafter no steps were taken to stop them; that the "people involved [were] retained" in the same jobs; and that in fact attempts were subsequently made to conceal what was going on (R. 557). The court ruled that if the government proved these things it would "let the conversation in," but not otherwise (R. 557). Following further colloquy (R. 557–558), the trial was recessed to the following day (R. 558–559).

When the witness resumed the stand the following morning, government counsel directed his attention to his testimony of the previous day that the approximate date of the conference with Mr. Teichman was February 1958. Counsel asked if the witness was sure of that date. The witness said he was not sure, that his best recollection was that it took place in "[a]pproximately September 1957" (R. 559). The

[14] If February 1958 had in fact been the date of the conference, it would have occurred after the terminal period of the conspiracy charged in the indictment (September 1956–November 1957). See *supra*, p. 4; R. 20–21.

court asked the witness if he had talked with government counsel while testifying, and the witness said he had (R. 559–560). Government counsel requested leave to "approach the bench," but the court refused, saying "[T]hat requires no explanation. It isn't in a criminal case, correct" (R. 560).

Following further direct testimony, during which the Teichman conference was not adverted to (R. 560–565), government counsel stated that he had concluded with the witness for the time being, but that he desired to recall him at a later time after a foundation had been laid for questions concerning what had been said at that conference (R. 565). This procedure was approved by the court (R. 565–566) and defense counsel commenced cross-examination (R. 566).

6. THE MOTIONS FOR ACQUITTAL

On cross-examination Rosenholm acknowledged that he had changed his testimony as to the date of the Teichman conference after talking with government counsel, Mr. Caner, during the recess (R. 567–568). The court at this point excused the jury and asked Mr. Caner if he wished to make any statement "as a matter of personal privilege" before the court "take[s] action" (R. 568). Mr. Caner answered that he was unaware of any impropriety in an attorney's speaking to a witness during a recess in order to ask him if his testimony on a particular point was accurate, and expressed complete astonishment that the court should think his action improper (*ibid.*). The court then directed the witness to leave the courtroom and, when Mr. Caner again said he had never known any impropriety in what he had done,

the court replied, "You will very soon learn" (R. 569). It then addressed Mr. Caner as follows (*ibid.*):

> You were here and you knew he was on the stand. You knew there was a recess. You know the principle that a witness must be examined in public. You know that, without suggesting for a moment that you offered any improper inducement, tampering with a witness is one of the most dangerous things in connection with a case, and particularly a criminal case, that a person should be left entirely alone during the course of his testimony. You must know that elementary fact and elementary rule.

Mr. Caner said he wanted "to disclaim any intention or act of tampering with the witness" (R. 569). Mr. Mitchell, the associate prosecutor, advised the court that it was "partly at [his] suggestion" that Mr. Caner spoke to the witness, and explained that he and Mr. Caner "wanted the truth [as to the date of the Teichman conference] to come out." The court replied that it was "glad that the truth has come out" (*ibid.*).

The court said that it was "not proposing to take any disciplinary action" against either government attorney; that it was "merely interested in whether this is a situation in which I must respond to a motion" (R. 569–570). Mr. Caner advised the court that the date of the conference was "a matter that other witnesses will testify to * * *. It can be ascertained when it happened" (R. 570). He then explained what had occurred at his conversation with the witness (*ibid.*):

> * * * I asked the witness whether the discussion with Teichman was before or after the

> FBI investigation, and whether he made the statement [15] in the course of the FBI investigation.
>
> I showed him the statement, and he observed the date on the statement. I then asked him what was his best memory as to the date at which the conversation with Teichman took place, and he stated that it was September of 1957. That was what happened, and I have never been aware of any impropriety [in] doing such a thing, your Honor.

The court said that it had not meant to suggest that counsel had knowingly done anything "wicked"; that it was (R. 570):

> merely inquiring as to what the facts were, and whether that constitutes such a prejudice to the defendants, quite apart from your intent, as to create a situation in which the Court must act in response to a motion.

Mr. Caner replied that (*ibid.*):

> no prejudice to the defendants arises, because the true facts will come out during the course of trial as to when the discussion occurred.

Following further colloquy, in which a defense attorney said he did not intend to "infer any conscious wrongdoing" by government counsel and the court reiterated its belief that counsel had knowingly done nothing wrong (R. 571), counsel for each defendant moved for a judgment of acquittal (R. 572).[16] Government counsel opposed the motions on

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[15] Apparently this refers to a statement concerning the conference which the witness made to the F.B.I.

[16] Counsel for the corporate petitioner moved in the alternative that the witness's testimony be stricken (R. 572).

the ground that a dismissal would serve neither justice nor the public interest (*ibid.*). He pointed out (*ibid*):

> There are many witnesses to be heard from, many more besides this witness. We have not heard the testimony of any of the test operators. We have only heard three witnesses in a case involving many witnesses.

"[T]he very most" that the court should do, he argued, was to strike the witness's testimony or such part of it as the court felt to be vitiated by the action of counsel which the court thought improper (R. 572).

7. THE JUDGMENT OF ACQUITTAL

The court thereupon recalled the jury, directed the witness to resume the stand (R. 572), and, following a statement to the jury (R. 572–575), directed it to return verdicts of acquittal as to all defendants (R. 575). The court's statement indicated that the principal basis for its action was its belief that government counsel's conversation with witness Rosenholm, resulting in the witness's change of testimony, constituted an infringement of the defendants' civil rights. Thus, the statement to the jury—which is reproduced in full in the Appendix (*infra,* pp. 63–66)—began (R. 572–573):

> Mr. Foreman and Members of the Jury, before I say anything else, let me make it absolutely clear that counsel for the defendants as well as the Court are persuaded that neither the United States Attorney nor either of his

> assistants consciously or deliberately violated any canon with which they were familiar. They were acting subjectively in good faith, and I do not mean at any stage of the remarks I am about to make to criticize them in the sense that I believe that they were conscious wrongdoers.
>
> On the other hand, a criminal prosecution is the most solemn proceeding which takes place in a court, and one of the most solemn activities with which man could be concerned on earth. The standards of a criminal prosecution in the United States require a constant awareness of the rights and liberties guaranteed by the United States Constitution, and a constant sensitivity with respect to the value of an open trial conducted with a full protection of the rights of any individual or any corporation summoned to answer a criminal charge.

After referring to Rosenholm's original testimony as to the date of the Teichman conference and asserting the "vital" importance of the date,[17] the court declared (R. 574–575):

> During the recess, and without in any way being conscious of a potential violation of any canon of ethics or any rule or principle, the Assistant United States Attorneys in this case admittedly conferred with this witness who was on the stand, and the conference with him took place either in the offices of the United States Attorney or in some similar place. It took place this morning before court, not under the supervision of a judge, and without the

[17] See note 14, *supra*, p. 16.

> presence of the defendants or counsel for the defendants.
>
> In this situation the witness took the stand this morning and on this very vital point gave an altered version in which the date now given becomes quite significant and has a connotation and importance which the date he gave yesterday did not have.

The court then referred to the principle that "many things which are true are not allowed to be shown" (citing the inadmissibility of true but involuntary confessions and of relevant but unlawfully seized evidence), and concluded (R. 575):

> These principles illustrate the sensitivity of American courts to fair play in connection with every aspect of the criminal law. It is not the duty of a court to see that every guilty man is punished. It is the duty of a court to see that every man gets a fair trial. The highest public interest is not the punishment of the wicked, but the establishment and maintenance of justice under law.
>
> Bearing in mind those principles, and responding to the motions of acquittal made by counsel for the individual defendants and the corporate defendant, I direct you at this stage to return the verdicts of acquittal with respect to each of the individuals and with respect to the corporation.

In addition, the court referred in a disparaging manner to the general character of the testimony of the two principal witnesses whom the government had so far had the opportunity to call, Palliotto and Rosenholm. The court said that these witnesses had shown "a lamentable lack of awareness or lack of ca-

pacity in connection with their testimonial obligations" (R. 573). The court related an anecdote about a judge who told the jury that he did not believe the witnesses for either side in a case before him—which story, he said, had "considerable application" to this case (R. 573–574).[18]

At the conclusion of the statement, the court directed the individual defendants to stand and said to them (R. 576):

> You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free.

A formal judgment of acquittal as to all three defendants was entered on the following day (R. 37).

SUMMARY OF ARGUMENT

I

The public, represented by the government, has a fundamental right to have a person indicted by a grand jury placed on trial for the crime charged, provided that a fair trial can be held. No judge has the power merely by entering a judgment of acquittal to deprive the public of its right to a hearing.

In this case the district judge attempted to acquit without a hearing. He directed a verdict before listening to the prosecution's case or otherwise ascertaining what evidence the prosecution could produce.

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[18] The judge also referred to Rosenholm as a witness who had shown "either a lamentable lack of memory or an extraordinary power of inventiveness." He alluded in this connection to Rosenholm's change of testimony as to "the cards" (see *supra*, p. 15; R. 575).

To judge evidence insufficient before hearing it, or even taking steps to ascertain what the evidence will be, is to deny a hearing; for the very idea of a hearing presupposes an effort to express a rational judgment and one cannot express a rational judgment upon what he has not even allowed to come to his attention. Therefore, the power to acquit for insufficient evidence does not arise until the court has heard the government's case or otherwise informed itself concerning it.

In the present case, the judge neither heard the evidence nor informed himself concerning it. As the majority of the court of appeals observed, he "abruptly terminated the Government's case * * * long before the Goverment had had an opportunity to show whether or not it had a case; and, moreover, he did so in ignorance of either the exact nature or the cogency of the specific evidence of guilt which Government's counsel said he had available and was ready to present" (R. 55).

Nor does the court have the power to enter a judgment of acquittal as a method of disciplining the prosecution for actual or supposed misconduct during the trial—at least not unless the conduct prevents holding a fair trial within a reasonable period. In the present case, there was no misconduct, but even if misconduct had occurred, the proper remedy would have been to declare a mistrial and impose such punishment upon the Assistant United States Attorney as the court deemed proper. "A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its

officers have not played according to rule." *McGuire* v. *United States*, 273 U.S. 95, 99.

Since the district judge had no power to direct a judgment of acquittal, the judgment was a nullity.

II

A new trial—the first true hearing—would not subject the defendants to double jeopardy in violation of the Constitution, for the supposed acquittal, being a nullity, will not support a plea of *autrefois acquit*.

In securing the constitutional right against double jeopardy, the courts must guard against "the mechanical application of an abstract formula" (*Wade v. Hunter*, 336 U.S. 684, 691). The purpose of the rule is to prevent oppression of the defendant. The bare fact that a jury has been impaneled and a trial has begun does not confer upon the defendants an unqualified right, if the trial is terminated, "to receive absolution for the crime." *United States* v. *Gori*, 282 F. 2d 43, 48 (C.A. 2), affirmed, 367 U.S. 364.

Where a district court terminates a trial without power, so that its action is a nullity, a new trial is no different from what occurs when the first trial is frustrated by supervening external circumstances, *e.g.*, *Wade* v. *Hunter*, *supra*. Similariy, the Court stated just last Term that a new trial was not unconstitutional where the district judge had earlier declared a mistrial "without the defendant's consent and even over his objection." (*Gori* v. *United States*, 367 U.S. 364, 368). From a constitutional standpoint, it should make no difference whether the judge declares a mistrial or exceeds his power and enters a purported judgment of acquittal.

Indeed, the argument that the plea of *autrefois acquit* is not available is stronger where the judge has acted without authority, *i.e.*, in excess of his jurisdiction, for it is well settled that the invalid judgment of a tribunal that lacked jurisdiction will not bar a subsequent prosecution before a tribunal having power to convict.

III

The court of appeals had the power to issue a writ of mandamus to order the purported judgment of acquittal vacated and the defendants placed on trial. The power to issue mandamus is conferred by the All Writs Act. It may be used in aid of appellate jurisdiction "to confine an inferior court to a lawful exercise of its prescribed jurisdiction" (*Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 26). On this point, the present case is covered in principle by *Ex parte United States*, 287 U.S. 241. In that case the district court had refused to issue a bench warrant for the arrest of a defendant against whom an indictment fair on its face had been returned. This Court granted a writ of mandamus directing the district court to issue the warrant because the effect of the district court's refusal had been to deny the government its right to put the accused on trial. In the instant case, the district judge's premature entry of a verdict of acquittal denied the government its right to put the accused on trial, in every true sense of the word "trial," and the writ of mandamus should issue for the same reasons as in *Ex parte United States*.

ARGUMENT

Our position that the judgment of acquittal was a nullity rests upon the proposition that the public, represented by the government, has the same fundamental right to be heard before a person charged by the grand jury is acquitted that the defendant has to be heard before he can be convicted. When there is not even a pretense of hearing the government's case, an arbitrary judgment of acquittal cannot eliminate beyond recall the public's right to a day in court. Petitioners' case, on the other hand, rests on the proposition that "the power of a trial judge to acquit defendants who are properly before him is absolute" (F. Br. 24; see also F. Br. 58, 60; S. Br. 35).[19] The historic ideal of a fair trial, which is the right of the public no less than the defendant, neither requires nor permits a single judge to exercise such absolute power. Now to order a trial—the first true hearing—would not subject defendants to double jeopardy. The All Writs statute gave the court of appeals jurisdiction to correct the assertion of nonexistent power.

I

THE JUDGMENT OF ACQUITTAL WAS VOID AS IN EXCESS OF THE COURT'S POWER

A majority of the court of appeals (Chief Judge Woodbury and Judge Hartigan) were "not * * * sure" whether the trial judge directed acquittal of the petitioners because he thought the testimony of

[19] "F. Br." refers to the brief of the individual petitioners, Fong Foo and Robert Knupp (No. 64). "S. Br." refers to the brief of Standard Coil Products Co., Inc. (No. 65).

two of the four witnesses put on by the United States at the outset of the trial was not entitled to belief or because he thought the action of the Assistant United States Attorney in talking with a government witness during a recess called while the witness was on direct examination deprived the defendants of some basic civil right. "But whether the judge acted as he did for one reason or for the other, or for both reasons in combination," the majority held, "his action was not only plainly erroneous but beyond his jurisdiction" (R. 50).

While Judge Aldrich agreed that the acquittal was void if it was based upon the prosecutor's action in speaking to the witness (R. 62–64), he was of the view that the judgment would have been valid (even though erroneous) if it were based upon the trial court's disbelief of the testimony (R. 59–62). However, he had "no reluctance in concluding" that "the reason [the district court] granted the motions for acquittal was the same one that caused it to invite them," namely, the action of government counsel in speaking to the witness. Judge Aldrich therefore concurred in the result (R. 64–65).

Although we agree with Judge Aldrich that the trial court acted to acquit because of the conduct of government counsel in speaking to the witness,[20] we

[20]Apparently this was also the view of petitioners Fong Foo and Robert Knupp, as indicated at p. 6 of their reply brief on their petition for a writ of certiorari.

As we read the trial court's statement to the jury at the time it directed the acquittal (*supra*, pp. 20–23; Appendix, *infra*, pp. 63–66) and the record of the antecedent events (*supra*, pp. 7–20), the alleged unreliability of the two prin-

do not agree that the acquittal was valid if based in part on the court's view as to the credibility of the testimony thus far adduced by the government. On this point we believe the majority was correct: the acquittal was *ultra vires* even if the judgment was based in part on the latter ground. In our discussion we assume that both factors influenced the court.

EXCEPT WHERE THE GOVERNMENT ACKNOWLEDGES THAT IT CANNOT OR DOES NOT PROPOSE TO PROVE A FACT DEEMED BY THE COURT ESSENTIAL TO CONVICTION, A COURT IS WITHOUT POWER TO ENTER A JUDGMENT OF ACQUITTAL UNTIL IT HAS HEARD THE EVIDENCE OF GUILT

1. The government rests its case on the fundamental proposition that the public has a right to be heard. Petitioners, on the other hand, contend that no such right exists, that the judge has an absolute power to acquit a person accused by a grand jury without hearing the evidence. Their contention rejects the idea of a trial as a rational search for truth. It would destroy the very meaning of the word. For a trial is a hearing, and it is as irrational for the judge to make a finding of "not guilty" upon evidence which he has not heard as it would be to allow the jury to convict before the defendant had put in his case.

Acquittal on the basis of the facts—the "legal and formal certification of the innocence of a person who

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cipal government witnesses was but incidental to the actual reason for acquittal—counsel's conversation with witness Rosenholm during the recess. See also Judge Aldrich's discussion at R. 64–65.

has been charged with crime"[21]—necessarily implies a judgment arrived at after hearing and evaluation of the evidence. It is a determination that the evidence brought forward by the prosecution is insufficient to justify a finding of guilt. Except where the prosecution acknowledges in advance that it cannot or does not propose to prove a fact deemed by the court essential to conviction (a case distinct from that presented here, see *infra,* pp. 33–36), the court must inform itself upon *all* the evidence of guilt before it is in a position to judge it insufficient.[22]

A court which has heard the proof of guilt is equipped to evaluate it. It then possesses the means for passing judgment whether to require the defendant to come forward with proof of his innocence or whether to acquit. At that point the court has the naked *power* to acquit even where the evidence of guilt may be strong—or would so appear to other judges or to an appellate court.[23] Such a determination, however arbitrary or mistaken, would involve at most an uncorrectible abuse of power for which the law provides no remedy. But unless the court has *heard* the proof or knows what the proof will be, it is simply not in a position to make a judgment as to the innocence of the accused.

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[21] Black's Law Dictionary (3d ed.), "Acquittal".

[22] This statement is subject to one qualification: if all the evidence is in upon an essential element of the crime, then the judge would have held a hearing upon that aspect and would have power to judge the evidence insufficient.

[23] At least it can be so assumed for purposes of this case, *arguendo.*

It is because of this fundamental irrationality that a "trial" lacks the substance of a hearing until the court has heard the prosecution's evidence: and without a hearing, we say, a court lacks the power to acquit. For this reason we cannot agree with the suggestion of the concurring judge below that the majority, in holding that the trial court exceeded its power in acquitting the petitioners before it heard the prosecution's evidence, was "misled by the relative magnitude of the district court's error into confusing a difference in degree with a difference in kind" (R. 62)—into failing to distinguish between egregious error and lack of power. The difference between denying the substance of a hearing and misjudging the evidence which has been heard is not a mere difference in degree, as this Court has recognized in many contexts.[24] The one vitiates the entire proceeding and thus is jurisdictional; the other is but a wrongful exercise of existing power. We also suggest that Judge Aldrich's observation that "[i]t is not always necessary to eat the whole of an egg to know it is rotten" (R. 61)—while true—is inapposite. The presence of one bad egg in a large basket hardly proves that all the eggs are rotten. A single egg is integral, at least in terms of rottenness. The eggs in a basket are usually discrete. The different parts of a prose-

[24] *E.g., The Japanese Immigrant Case*, 189 U.S. 86, 100–101; *Chin Yow* v. *United States*, 208 U.S. 8, 13; *Zakonaite* v. *Wolf*, 226 U.S. 272, 274–275; *Frank* v. *Mangum*, 237 U.S. 309, 326; *Kwock Jan Fat* v. *White*, 253 U.S. 454, 457–458; *Morgan* v. *United States*, 298 U.S. 468, 479–482.

cutor's evidence are also separable, for the shortcomings of one witness's evidence are not attributable to the witnesses to follow. Except where all the proof upon an essential element of the crime has been introduced, or the prosecution has conceded its inability or lack of intent to establish a fact which the trial court deems necessary (pp. 33-36, *infra*), the insufficiency or unreliability of one part of the prosecution's case has no tendency to prove that the other parts, not yet heard or even summarized, are inadequate. As the majority observed (R. 55), the trial judge—

> abruptly terminated the Government's case * * * long before the Government had had an opportunity to show whether or not it had a case; and, moreover, he did so in ignorance of either the exact nature or the cogency of the specific evidence of guilt which Government's counsel said he had available and was ready to present.

Although the conclusion that the trial judge exceeded his authority flows from consideration of the nature of the trial process and does not depend for its validity on a particular rule or statute, it is confirmed by Rule 29(a) of the Federal Rules of Criminal Procedure (*supra*, p. 3). That rule authorizes the entry of a judgment of acquittal "after the evidence on either side *is closed*" (emphasis added)—where the evidence is insufficient for conviction. The clear implication is that—aside from the exceptional case not presented here, *i.e.*, where there is a concession by the government, in advance of completion of the presentation of its case, that it cannot or will not prove a fact thought essential by the court—an acquittal at any prior time is unauthorized. The rule thus gives ex-

plicit recognition, and the force of law, to a requirement rooted in logic.

Thus, even if it be assumed (contrary to the fundamental principle that the credibility of the witnesses is for the jury) that a court has the power to acquit an accused solely because it deems unreliable, or disbelieves, all the witnesses offered by the prosecution, it is clear that, at the least, it must first have heard their testimony. As the court did not do so here, it was without power to acquit.

2. This is not to say that there are no circumstances under which a court can enter a valid judgment of acquittal until it has heard all the evidence the government proposes to present. There is one well-recognized exception. A court may validly acquit without waiting to hear the government out where it appears from the opening statement, from a subsequent stipulation or concession, from completion of the evidence upon an essential element of the offense, or in any other manner, that the government cannot or does not propose to prove a fact which in the court's view is necessary to convict. *McGuire* v. *United States*, 152 F. 2d 577, 580 (C.A. 8); *Stuthman* v. *United States*, 67 F. 2d 521, 523 (C.A. 8); *United States* v. *Dietrich*, 126 Fed. 676, 677–678 (C.C. D. Neb.); *United States* v. *Maryland Cooperative Milk Producers*, 145 F. Supp. 151, 152 (D. D.C.).[25] In such cases the essential right to a hearing is preserved. The government cannot complain that the public has not been heard if upon its own state-

[25] A like rule obtains in civil cases. *Best* v. *District of Columbia*, 291 U.S. 411, 415; *Liverpool Steamship Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 37; *Oscanyan* v. *Arms Co.*, 103 U.S. 261, 263.

ment of its case, upon its concession, or upon full presentation of the evidence on an essential element of the crime, a fatal defect appears. As observed by Circuit Judge (later Mr. Justice) Van Devanter in *United States* v. *Dietrich, supra,* 126 Fed. at 677–678—

> The court has the same power to act upon such an admission that it would have to act upon the evidence if produced. It would be a waste of time to listen to evidence of other matters when at the outset a fact is clearly and deliberately admitted which must defeat the prosecution in the end.

United States v. *Weissman,* 266 U.S. 377, as the concurring opinion below recognized (R. 60), involved essentially an application of this principle. Petitioners' reliance on that decision for the proposition that a court which has jurisdiction of the cause has absolute power to render a valid judgment of acquittal at any stage in the proceedings (F. Br. 56–57, 59; S. Br. 35–36, 39, 51) is misplaced. The government sought there to appeal from a verdict of not guilty directed by the trial court after the impaneling of the jury but before any evidence had been presented or opening statements made. The government argued that the trial court had exceeded its authority. This Court sustained the authority of the trial court and dismissed the appeal. The basis of the trial court's action, however, was that "no valid conviction could be had" because the indictment failed to charge an offense.[26] 266 U.S. at 378. This, as we have seen, is

[26] The fact that the court might have been wrong in its construction of the indictment did not affect its power to acquit. Similarly, the fact that a court might be wrong in its belief that a certain fact must be proved in order to sustain a con-

precisely the kind of situation in which a court may validly acquit without waiting to hear the government's evidence since, regardless of what the evidence may be, the prosecution must fail in the end.[27]

No such exceptional situation existed here. If the evidence moved the court to acquit, it was not because an incurable defect had appeared but because the court believed that Palliotto and Rosenholm were not credible witnesses.[28] But rejection of the entirety of their testimony would not have been fatal to the government's case. Palliotto's testimony (*supra*, pp. 6–14) related solely to preliminary matters of an explanatory or "background" character. It was meant to help the jury understand the testing procedures in order to assist them later in following the "fraud" testimony and was not necessary to prove the offenses alleged. As the prosecutor explained, the government could have proved this part of its case solely from documentary evidence.

Rosenholm, although a witness to specific fraudulent acts, was only the first such witness. As govern-

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viction would not affect its power to acquit when the government acknowledges its inability to prove that fact.

[27] Under the circumstances *Weissman* has no bearing on the issue here, which is whether an acquittal granted in excess of the court's power may be vacated to permit retrial. It may be noted further that the Court was not presented with the question whether the valid verdict of not guilty granted on the ground that the "indictment was invalid because no offence was properly charged," 266 U.S. at 378, was a bar to subsequent prosecution of the defendant under a proper indictment.

[28] The other, and we believe principal, basis of the judgment—the fact that the prosecutor spoke to Rosenholm during a recess—has no relation to the sufficiency of the proof, the lack of which is the normal ground for a judgment of acquittal. That basis of the judgment is discussed *infra*, pp. 37–40.

ment counsel advised the court, there were many more "fraud" witnesses yet to be heard, including the persons who actually conducted the tests and thus had specific and personal knowledge of their fraudulent character (R. 572). The court could not know whether the witnesses still to be called could repair whatever weaknesses in Rosenholm's testimony it thought it perceived. As for the date of the Teichman conference—the subject of the witness's change of testimony which was apparently the critical factor in the court's evaluation of his reliability—the prosecutor made clear that the date was not in dispute and would be established by other witnesses (*supra*, pp. 18, 19).[29]

In sum, until the government has had the opportunity to present the whole of its evidence, an acquittal on the evidence—except in the narrow class of cases referred to at pp. 33–35, *supra*—is a usurpation of power. The distinction between an acquittal which, though erroneous, is rendered after the close of the government's case and an acquittal entered prior to that time is not a mere distinction between error and great error, as petitioners suggest (see F. Br. 60–61; S. Br. 34–35) and the concurring judge below concluded (R. 61–62; see *supra*, pp. 31–32). It is, as the majority of the court of appeals held (R. 50, 54–55), the difference between an erroneous decision as to an issue properly before the trial court and a decision made prior to a hearing and therefore before power exists to make a decision at all.

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[29] The court had itself stated earlier that significant aspects of the conference could be proved "aliunde" (R. 558, 571)—*i.e.*, through other witnesses than Rosenholm.

B. GOVERNMENT COUNSEL'S CONVERSATION WITH WITNESS ROSENHOLM DURING A RECESS CONCERNING THE ACCURACY OF A POINT IN HIS TESTIMONY, AS A RESULT OF WHICH THE WITNESS CORRECTED HIS TESTIMONY, WAS NOT A VALID BASIS FOR ACQUITTAL

The trial court had no power to acquit because of the conduct of government counsel in checking with witness Rosenholm during a recess as to the accuracy of a date he had given, as a result of which the witness corrected himself.[30] The ground was inherently defective as a basis for the action taken.

Acquittal—the formal adjudication of an accused's innocence (see *supra*, pp. 29–30)—necessarily implies a determination that the evidence is insufficient to support a proper accusation. The court, therefore, has no power to acquit because of misconduct of the prosecutor and without an adjudication on the merits of guilt or innocence, except possibly where in the court's judgment such conduct renders a fair trial impossible at any time in the future (see *infra*, pp. 38–39). To acquit the accused as a way of disciplining the prosecutor for misconduct is scarcely less arbitrary than convicting the defendant as a way of punishing the defense attorney's misconduct. The court possesses ample power to utilize other effective means to discipline attorneys for trial misbehavior.[31]

[30] This would have been an invalid basis for acquittal irrespective of the point in the trial at which the judgment was entered.

[31] *E.g.*, in an aggravated situation, where a simple reprimand seemed inadequate or had proved ineffective, the power of contempt might appropriately be exercised. Cf. *Offutt* v. *United States*, 348 U.S. 11; *Sacher* v. *United States*, 343 U.S. 1; *Cooke* v. *United States*, 267 U.S. 517. In an extreme case, where it appeared that the misconduct was such as to compromise the fairness of the trial, a mistrial could be declared. Cf. *Gori* v. *United States*, 367 U.S. 364.

"A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule." *McGuire* v. *United States,* 273 U.S. 95, 99.

The court, of course, retains power to take action considered necessary to insure that persons accused in its forum receive a fair trial. Pursuant to this power the court may declare a mistrial where, in its judgment, the conduct of the prosecutor renders the proceeding unfair to the accused (*Gori* v. *United States,* 367 U.S. 364). It is at least arguable that the same power may be utilized by the court to acquit the defendants so as to bar any future retrial where misconduct by the government is of such a nature as to prevent a fair trial from ever being held [33] (*e.g.,* if a key defense witness were deported to prevent him from testifying, or if records vital to the defense were destroyed by agents of the government [33]) or where the government deliberately refuses to obey a valid court order designed to give the defendant a fair trial.[34] Even in such circumstances, however,

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[33] Cf. *Caldwell* v. *United States*, 205 F. 2d 879, 881–882, note 11 (C.A. D.C.).

[33] Cf. *United States* v. *Heath*, 260 F. 2d 623 (C.A. 9) (defendant's records, vital to defense, lost by government agents to whom they had been loaned; trial had not commenced; indictment dismissed).

[34] Cf. *Jencks* v. *United States*, 353 U.S. 657, 672, where the Court said that a criminal action "must be dismissed" where the government, on the ground of privilege, elects not to comply with an order to produce for the accused's inspection statements in its possession of government witnesses touching the subject matter of their testimony. But see 18 U.S.C. 3500(d), where Congress has provided the lesser remedy of

the appropriate remedy would be to dismiss the indictment (or declare a mistrial), with prejudice. For the action, no matter how aggravated, is not probative of the guilt or innocence of the accused. But even assuming that in such circumstances a court might have power to acquit, no such situation arose here (see Appendix, *infra*, pp. 63–66; R. 572–575).

The trial court itself did not believe that government counsel had engaged in any deliberate misconduct (see *supra*, pp. 19, 20–21). Actually, as the court of appeals held (R. 53), there was no misconduct at all. The trial court had earlier suggested the very conduct to which it later took such violent exception, proposing to a government witness (Palliotto) that he "rehearse" his testimony on a certain point with government counsel (R. 148; see also R. 118). It is difficult, therefore, as the court of appeals observed (R. 53), "to understand the basis for the judge's criticism of the Assistant United States Attorney for talking with a Government witness during a recess."

> We are not aware of any rule of law, "elementary" or otherwise, or any canon of professional conduct forbidding the practice. Of course, as a matter of trial tactics, counsel ordinarily avoid talking with a witness during a recess called while the witness is on the stand so as not to provide opposing counsel with a point to argue to the jury. But tactics are one thing and rules of law and canons of ethics are quite another.

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striking the testimony of the witness from the record, unless the court in its discretion determines "that the interests of justice require that a *mistrial* be declared" (emphasis added).

The point about which counsel spoke to the witness—the date of the Teichman conference—was not in dispute. As counsel advised the court, the date of the conference was "a matter that other witnesses will testify to * * *. It can be ascertained when it happened" (R. 570). The witness's original testimony as to the date, moreover, was only an estimate given in response to insistent questioning by the court [35] after the witness had stated that he was not sure of the date (R. 552). Counsel's motivation in raising the point with the witness during the recess was the desire for "the truth to come out" (R. 569).[36] He might, to be sure, have waited until the witness had resumed the stand, but there was no impropriety in his acting during the recess. Counsel's handling of the matter, as the court of appeals observed (R. 53), merited commendation rather than censure. Cf. *Frazer* v. *United States*, 233 F. 2d 1, 2 (C.A. 9), where, as the court noted (R. 53), "counsel for the Government was commended for privately reminding a witness of a false statement in her testimony thereby causing her to change her testimony to conform to the truth."

We conclude, therefore, that the extraordinary judgment of acquittal was the result of

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[35] It appears from the transcript that the court's question may have suggested the erroneous year, 1958, as the date of the conference (R. 552):

"Q. Approximately when did you have the discussion?

"A. I am not sure.

"The COURT. Can't you tell us whether it was 1958 or—?

"The WITNESS. It was 1958."

[36] It would have been improper for counsel to have left standing the witness's incorrect estimate of the date, when he knew it to be wrong. Cf. *Napue* v. *Illinois*, 360 U.S. 264, 269.

an assertion of non-existent power. The court's action was substantially the same as if he had walked into the courtroom on the first day of trial and directed an acquittal, as Judge Aldrich suggested, "on the basis of some rule of thumb that more than three government questions, asked in good faith, but regarded by the court as irrelevant, had unduly delayed the trial" (R. 63). The judgment, having no foundation in legal power, was a nullity.

II

BEING A NULLITY, THE ACQUITTAL IS NOT A BAR TO THE ACCUSED'S RETRIAL AND WAS PROPERLY ORDERED VACATED

A. AN INVALID JUDGMENT OF ACQUITTAL, PRECISELY BECAUSE IT IS A NULLITY, WILL NOT SUPPORT A PLEA OF *AUTREFOIS ACQUIT*

1. Few principles of the Anglo-American law have a longer history or are more properly revered than the rule that, once acquitted, a man may not be tried again. This Court, we of course agree, must be alert to prevent encroachments upon the rule. On the other hand, as the Court has said, in the field of double jeopardy as in other areas of the law, one must guard against "the mechanical application of an abstract formula" (*Wade* v. *Hunter*, 336 U.S. 684, 691). What petitioners, in essence, ask this Court to do is to apply mechanically the "abstract formula" of the rule of *autrefois acquit* to a unique factual situation never intended to be encompassed by the rule and wholly foreign to its spirit and true purpose. Because the trial court pronounced the formula of "acquittal," they say, the government is barred for-

ever from further prosecutive action—regardless of whether the court had power to take such action,"[37] and irrespective of the interests of justice.

The court of appeals, we contend, properly rejected this argument. With Judge Aldrich, we are "unwilling to think that such a totally arbitrary act in the course of trial with no semblance of justification behind it, should deprive the government of its day in court" (R. 63–64). "As against a defendant's right to be free from double jeopardy," as Judge Aldrich observed, "there is the interest of the public in the prosecution and conviction of criminals" (R. 63). We submit that the judgment of the court of appeals, without in any wise trenching upon petitioners' right to be free from double jeopardy, has properly protected this public interest. For it can be said as pertinently in this case as the court of appeals said in *Gori,* that for petitioners "to receive absolution for [their] crime[s] * * * because the judge acted too hastily in [their] interest, would be an injustice to the public in the particular case and a disastrous precedent for the future." *United States* v. *Gori,* 282 F. 2d 43, 48 (C.A. 2), affirmed, 367 U.S. 364.

2. If it be concluded, as we think it must, that the trial court lacked power to enter the judgment of acquittal, it follows that petitioners' contention that the court of appeals was prevented by the principles of double jeopardy from ordering the judgment vacated

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[37] As noted *infra*, p. 46, note 42, petitioners' arguments on the double jeopardy issue are based in part on the assumption, *arguendo*, that the judgment of acquittal was a nullity.

and the case reassigned for trial (F. Br. 26–42; S. Br. 52–63) should be rejected. As observed by the court of appeals—and on this point there was no dissent—"from our conclusion that the trial judge had no power, that is to say no jurisdiction, to enter judgment of acquittal, it follows under principles too well established to require citation of authorities that the judgment is void—a nullity—and hence affords no basis for the defense of double jeopardy" (R. 58). A judgment having "absolutely no legal force or effect" [38] cannot support a plea of *autrefois acquit*.

We do not contend that the exact issue presented here—whether a judgment of acquittal, void because the trial court acted in excess of its power, bars retrial—has been previously decided in favor of the government. However, neither can the petitioners assert that any court has resolved the issue in their favor. To our knowledge, the precise question has never been presented. The Court is free, therefore, to decide the case as reason and justice dictate. We believe that the right of the accused to be free of oppression in the form of multiple trials does not here demand denial of "the interest of the public in the prosecution and conviction of criminals" (R. 63). Cf. *Ex parte United States*, 287 U.S. 241, 249; *United States* v. *Thompson*, 251 U.S. 407, 415. Both may be preserved without renunciation of the policies which gave rise to the rule and the principles which this Court has declared in previous decisions interpreting its meaning.

[38] Black's Law Dictionary (3d ed.), "Nullity."

It is a well recognized axiom in the law of double jeopardy that the defense of *autrefois acquit* is available only where the accused was acquitted by a tribunal having jurisdiction.[39] "An acquittal before a court having no jurisdiction," as this Court observed in *United States* v. *Ball*, 163 U.S. 662, 669, "is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offence."[40] In *Commonwealth* v. *Peters*, 53 Mass. (12 Met.) 387 (1847)—which the Court cited in the *Ball* case, 163 U.S. at 669, as illustrative of the prin-

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[39] *E.g.*, 2 Hawkins, *Pleas of the Crown* (6th ed., 1787), ch. 35, § 1; 1 Chitty, *Criminal Law* (5th Am. ed., 1847), p. 458; 4 Blackstone, *Commentaries* (Lewis ed., 1900), p. 335; 2 Russell, *Crimes and Misdemeanors* (7th ed. 1910), p. 1984; 1 Bishop, Criminal Law (9th ed., 1923), § 1028; Archbold, *Criminal Pleading, Evidence & Practice* (34th ed., 1959), § 438; see American Law Institute, *Administration of the Criminal Law* (Double Jeopardy) (1935), pp. 11, 92.

[40] To like effect are *Strobhar* v. *State*, 55 Fla. 167, 180 (1908); *Paulsen* v. *People*, 195 Ill. 507, 514 (1902); *State* v. *Odell*, 4 Blackf. (Ind.) 156 (1836); *Slater* v. *Commonwealth*, 239 Ky. 620, 623 (1931); *Crawford* v. *State*, 174 Md. 175, 180 (1938); *Commonwealth* v. *Peters*, 53 Mass. (12 Met.) 387, 392 (1847); *State* v. *Rother*, 130 Mont. 357, 363 (1956); *State* v. *Hodgkins*, 42 N.H. 474, 477 (1861); *People ex rel. Hillman* v. *Hull*, 131 N.Y. Misc. 253, 255 (1928); *State* v. *Howell*, 220 S.C. 178, 184 (1951); *Commonwealth* v. *Myers*, 1 Va. Cas. 188, 248–249 (1811).

The principle applies equally to a prior conviction. *Diaz* v. *United States*, 223 U.S. 442, 449. For state cases see American Law Institute, *Administration of the Criminal Law* (Double Jeopardy) (1935), pp. 92–93. Cf. *Mitchell* v. *Youell*, 130 F. 2d 880, 882 (C.A. 4), holding that a prisoner under an invalid state conviction, rendered at a trial in which he was denied the assistance of counsel, was subject to proper retrial by the state authorities.

ciple—the Massachusetts court sustained a state conviction for an offense of which the accused had previously been acquitted by the local federal court. Holding the federal court to have been without jurisdiction of the crime (assault aboard a ship anchored in Boston harbor), the state court ruled that the federal acquittal, being a nullity, was no bar to the state prosecution. "The universal rule," as stated in a comparatively recent study, "is that [an] * * * acquittal in a court having no jurisdiction is not a bar to a prosecution for the same offense in a court having jurisdiction." American Law Institute, *Administration of the Criminal Law* (Double Jeopardy) (1935), p. 92."

" On similar grounds the courts have held, both in this country and in England, that an acquittal procured through collusion or fraud (though the tribunal had general jurisdiction of the offense) is not a bar to a subsequent proper trial. See, *e.g.*, *State* v. *Ketchum*, 113 Ark. 68 (1914); *Brackney* v. *State*, 182 Ind. 343, 345 (1914); *State* v. *Green*, 16 Iowa 239 (1864); *McDermott* v. *Commonwealth*, 30 Ky. L. Rep. 1227 (1907); *Price* v. *State*, 104 Miss. 288, 295 (1913); *State* v. *Simpson*, 79 N.C. 632 (1878); *State* v. *Howell*, 220 S.C. 178, 189 (1951); *The King* v. *Davis*, 12 Mod. 8, 88 Eng. Rep. 1129 (1691); *Rex* v. *Bear*, 2 Salk. 646, 91 Eng. Rep. 547 (1697); *Rex.* v. *Furser*, Sayer, 90, 96 Eng. Rep. 813 (1753); *The King* v. *Taylor*, 3 B. & C. 612, 615-616, 107 Eng. Rep. 860, 861 (1825). See 1 Chitty, *Criminal Law* (5th Am. ed., 1847), p. 657; 9 Bacon's Abridgment (1852 ed.), pp. 627-628; 3 Greenleaf, *Evidence* (16th ed., 1899), § 38; Clark, *Criminal Procedure* (2d ed., 1918), pp. 454-455; 1 Bishop, *Criminal Law* (9th ed., 1923), § 1009; American Law Institute, *Administration of the Criminal Law* (Double Jeopardy) (1935), pp. 12, 104.

A collusively procured conviction is similarly ineffective to bar a proper retrial. See cases collected in American Law Institute, *op. cit. supra*, p. 104.

We recognize that the principle of law, as articulated in these cases, is that where the tribunal lacks jurisdiction of the cause its judgment is invalid because it is part of a total proceeding which is invalid. Here, only the judgment was invalid. The court had jurisdiction of the cause in other respects. But we submit that the same principle should apply in both cases, for it makes no difference from the standpoint of double jeopardy whether the prior acquittal was void because the court exceeded its authority generally or because, while authorized to hear the case, it exceeded its powers in rendering the judgment. See *infra*, pp. 46–48. It is the nullity of the prior judgment, not the reason for the nullity, which renders it ineffectual as the basis of a plea of *autrefois acquit*.

3. Petitioners attempt to avoid the force of this principle [42] by pointing out that it developed in cases where the accused, because the acquitting court lacked jurisdiction, was in contemplation of law never in jeopardy at all. They argue that a retrial would subject them to a second jeopardy and that it is the subjecting of a person, for the same offense, to be twice "put in jeopardy" which the constitutional guaranty in terms forbids (F. Br. 28–29, 34–35; S. Br. 56–59). The argument rests on a manipulation of labels and should be rejected. Cf. *Palko* v. *Connecticut*, 302 U.S. 319, 323.

It is true, of course, that petitioners have been in jeopardy. It does not follow, however, that a retrial

[42] Although they do not acknowledge the judgment's invalidity, petitioners argue that they cannot be retried even if it was invalid (F. Br. 30, 34–35; S. Br. 56–58).

will be a second jeopardy. Petitioners err, we submit, in their assumption that the judgment of acquittal terminated the jeopardy which attached when their trial began. If, as we have argued, that judgment was a nullity, it had "absolutely no legal force or effect" (see *supra*, p. 43) and did not terminate petitioners' jeopardy. The retrial ordered by the court of appeals will thus entail, not a second jeopardy, but a continuation of the first.

The government's position involves no novel concept. On the contrary, petitioners' situation is analogous to that of an accused who is required to undergo retrial following a mistrial—whether resulting from the inability of the jury to agree upon a verdict (*United States* v. *Perez*, 9 Wheat. 579; *Logan* v. *United States*, 144 U.S. 263, 297–298; cf. *Dreyer* v. *Illinois*, 187 U.S. 71, 85–86; *Keerl* v. *Montana*, 213 U.S. 135) or from any one of the other causes which this Court has held to constitute adequate bases for such action (*e.g.*, *Simmons* v. *United States*, 142 U.S. 148; *Thompson* v. *United States*, 155 U.S. 271, 273–274; *Wade* v. *Hunter*, 336 U.S. 684; *Gori* v. *United States*, 367 U.S. 364; cf. *Brock* v. *North Carolina*, 344 U.S. 424; *Lovato* v. *New Mexico*, 242 U.S. 199).[43]

[43] Where a new trial is ordered following the reversal of a conviction on appeal, some courts have similarly viewed the second trial as continuing the jeopardy which originally attached. *E.g.*, *State* v. *Keerl*, 33 Mont. 501, 516 (1905), affirmed on other grounds *sub nom. Keerl* v. *Montana*, 213 U.S. 135. Compare the view of Mr. Justice Holmes (concurred in by Justices White and McKenna) in his dissenting opinion in *Kepner* v. *United States*, 195 U.S. 100, 134: "* * * it seems to me that logically and rationally a man cannot be said to be

The situation of the accused in the "mistrial" cases cannot be distinguished on a theory that in those cases the accused "consents" to be retried, whereas here there has been no such consent. Cf. the arguments of petitioners at F. Br. 35–36, 39–42; S. Br. 58–63. In none of the cases cited above did the defendant "consent"—either to retrial or to the declaration of the mistrial. In some, indeed, the mistrial was declared over the defendant's specific objection.[11] The law is, in short, that a mistrial followed by retrial may be declared in a proper case "without the defendant's consent and even over his objection." *Gori* v. *United States, supra*, 367 U.S. at 368.

The "mistrial" cases also refute the argument of the individual petitioners (F. Br. 35) that their "second trial" will be "undeniably * * * a second jeopardy"

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more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause." Other courts have treated the new trial as involving a second jeopardy, but one to which the accused consented when he asked that the conviction be set aside. See *Green* v. *United States*, 355 U.S. 184, 189, and cases cited. Whichever be the sounder approach from a theoretical viewpoint, it has of course long been settled that the government has a right to retry a defendant who has obtained a reversal of his conviction on appeal. *United States* v. *Ball*, 163 U.S. 662, 671–672; *Green* v. *United States*, *supra*, at 189.

[11] See, *e.g.*, *Simmons* v. *United States*, *supra*, 142 U.S. at 149–150; *Brock* v. *North Carolina*, *supra*, 344 U.S. at 425. Petitioners contend that double jeopardy bars retrial where the court has declared a mistrial in aid of the prosecution. It is beyond dispute, however, that the trial court's action here was not taken for this purpose, and, therefore, that, whatever the validity of the proposition, it has no application to this case.

because it will be "impossible to impanel the same jury and resume the same trial." In the cases involving mistrials, the retrials have also been before new juries. Indeed, in the more common type of mistrial, it is precisely because the first jury could not agree that retrial before a new jury is necessary. But the necessity of impaneling a new jury has never been thought inconsistent with the view that the second trial continues the jeopardy which attached at the first trial, or otherwise to present a valid objection to the procedure on double jeopardy grounds.

4. Underlying petitioners' double jeopardy arguments, perhaps, is the notion that it is somehow offensive to basic concepts of fair play to compel an accused whom a court acquitted again to "run the gantlet" [43] regardless of the court's lack of authority to render such a judgment. The situation of such a person, however, does not differ essentially from that of an accused who has won acquittal in a court which is later held to have lacked authority to hear his case, and who must as a result again submit to trial. The necessity and propriety of the latter procedure has, as we have seen, never been questioned. *Supra*, pp. 44–46. See, particularly, *Commonwealth* v. *Peters*, 12 Mete. (53 Mass.) 387 (1847), which was cited with approval by this Court in *United States* v. *Ball*, 163 U.S. 662, 669.

In one important respect, furthermore, petitioners can lay less claim to judicial sympathy than those defendants who have faced a similar prospect in the historically more typical situation just described. In

[43] *Gori* v. *United States*, 367 U.S. 364, 373 (dissenting opinion).

the same respect, the present case differs—to petitioners' disadvantage—from *Gori* v. *United States*, 367 U.S. 364, a decision which, though it involved a declaration of a mistrial rather than a judgment of acquittal, was similar to this case in that the court's order, while purporting to favor the accused, in fact had the effect of subjecting him to the necessity of a second trial. For petitioners, unlike the defendants in *Gori* and the other cases, brought on themselves the necessity for a second trial, by specifically requesting the entry of the judgment of acquittal which makes the new trial necessary.

In *Gori*, the declaration of the mistrial was wholly unsolicited, although made in defendant's interest. 367 U.S. at 365. It could well be, therefore, that if the court in *Gori* had consulted the wishes of the defendant, he might have indicated a preference to proceed with the trial and so avoid the necessity of a second trial. This Court nevertheless sustained the second trial as not barred by the prohibition against double jeopardy. The trial judge in petitioners' case, on the other hand, did not take the action which has resulted in the need for another trial (the rendering of the abortive and unauthorized judgment of acquittal) until the attorneys for all of the defendants had moved for acquittal (R. 569–570, 572; *supra*, pp. 19–20). It is true that the court invited the making of "a motion" (it did not specify what kind of motion it had in

mind [46]). But the fact remains that the judge did not enter the abortive judgment ending the trial until he was requested to do so. For this reason, we submit, the petitioners themselves are chargeable in some measure with responsibility for the retrial.

5. *Regina* v. *Middlesex Justices* (*Ex parte Director of Public Prosecutions*), [1952] 2 All Eng. Rep. 312,[47] cited by the individual petitioners at F. Br. 32-33, while similar in some respects to the present case, is not a precedent for reversal of the court of appeals. The case arose on a motion by the Attorney General, in the Queen's Bench Division of the High Court, for an order of certiorari quashing an acquittal on a charge of operating a vehicle while under the influence of liquor, and for an order of mandamus directing the justices of the Middlesex Quarter Sessions (where the acquittal had occurred) to try the charge. It was the contention of the Crown that, notwithstanding the acquittal, there had been no real trial.

It appeared that, before the jury had been sworn, the chairman of the Quarter Sessions stated to the prosecuting attorney, within the jurors' hearing, that he had "read the depositions very carefully"[48] and

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[46] That the defense attorneys were not sure what kind of "motion" the judge had in mind is evidenced by the fact that one of them moved for acquittal or in the alternative that the testimony of the witness Rosenholm (the witness then on the stand, whose change of testimony had triggered the colloquy which resulted in the acquittals) be stricken (R. 572; *supra*, p. 19, note 16).

[47] The case is reported more fully under a slightly different caption at [1952] 2 Q.B. 758.

[48] These depositions had been taken previously in the "petty sessional court," where the defendant had been afforded the right of cross examination. [1952] 2 Q.B. 758, 764.

that he "did not think any jury would convict." The prosecutor advised the chairman that the evidence was, in the Crown's view, sufficient to warrant submission to the jury and that he had instructions to proceed. The chairman permitted the jury to be sworn and the prosecutor to make an opening statement outlining the evidence he proposed to present. Following the prosecutor's opening, but before any evidence was adduced, the chairman displayed to the jury certain documents bearing the handwriting of the defendant, which the latter had supposedly written shortly following the incident involved in the charge, and said: "Just look at it, members of the jury. That is handwriting which, it is suggested, is the handwriting of a man under the influence of drink. It is a matter entirely for you, but I think it is just sheer waste of time for you to consider it." The chairman then asked the jury whether it wished to hear the prosecution's evidence. The foreman replied, "Under your direction, I should say no, my Lord," whereupon a verdict of "Not Guilty by direction" was entered ([1952] 2 All Eng. Rep. at 312–313; [1952] 2 Q.B. at 763–767).

The Queen's Bench Division, while expressing its "gravest disapprobation" of the chairman's action ([1952] 2 All Eng. Rep. at 313; [1952] 2 Q.B. at 767), nevertheless declined to quash the judgment. It agreed that "in one sense" there had been no trial, since the chairman's action had "prevented any evidence from being given," but held that it (the review-

ing court) had ([1952] 2 All Eng. Rep. at 313; [1952] 2 Q.B. at 768):

> no power to order a re-trial in any case unless there has been what in law can properly be described as a mistrial and consequently a nullity.

The decision is distinguished by the fact that, before directing the acquittal, the trial court there had "very carefully" familiarized itself with the pre-trial depositions of witnesses to be called by the prosecution, which were available as a result of proceedings already had in the petty sessional court, where cross examination was permitted (*supra*, p. 51). Based upon these depositions and upon exhibits of the defendant's handwriting taken immediately after the arrest and after hearing the prosecution's opening statement, the court concluded "it is just sheer waste of time" for the jury to hear the case (2 All Eng. Rep. at 312; 2 Q.B. at 765), and therefore directed the acquittal. This action, however much in error and however much disapproved, confronted the Queen's Bench Division with an entirely different issue than that presented here where the trial court acquitted *without knowledge* of the prosecution's case in chief. The difference is crucial (see *supra*, pp. 29–36). It is the difference between an erroneous action within the court's power (acquittal on the evidence) and action before the court has power to act (acquittal without knowledge of the evidence).

We submit further that this decision is not persuasive because of the historical differences in the British and American attitudes towards second trials (see *Green* v. *United States*, 355 U.S. 184, 203 (dissenting

opinion of Mr. Justice Frankfurter)). The position of the British courts appears to be that the rule against double jeopardy precludes retrial wherever there has been a final judgment, provided the court had jurisdiction of the cause.[49] A defendant whose conviction is set aside on appeal goes free (*ibid.*, and sources there cited). Since the rule has never been given such an interpretation in the federal system, petitioners' reliance on the *Middlesex Justices* decision is misplaced.[50]

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[49] The rule does not appear to be applied where an acquittal was procured through collusion or fraud. See *supra*, p. 45, n. 41.

[50] The *Middlesex Justices* case is also marked by the inadequate and inapposite rationale which impelled the Queen's Bench Division to rule against the Attorney General. Thus, the Chief Justice said ([1952] 2 All Eng. Rep. at 314: [1952] 2 Q.B. at 768–769):

"* * * Here we are unable to say that there has been anything in the nature of a mistrial. To constitute a mistrial the proceedings must have been abortive from beginning to end so that, had the record been drawn up, the error would have been apparent: [Citation omitted.] The fact that the jury have acquitted without evidence would not appear on the record. This is what happens whenever counsel for the prosecution offers no evidence. The prisoner is then in charge of the jury and they are directed to return a verdict of Not Guilty, no evidence having been offered. The verdict is received and recorded, and the prisoner is discharged. Suppose counsel for the prosecution in the exercise of his discretion offered no evidence, it would not be open to the prosecutor to come to this court and ask that the case should be sent down for re-trial because he wanted evidence given and did not agree with the course that counsel had adopted. Here the defendant was properly arraigned and the jury sworn to try him, so technically he was in peril, and as they returned a verdict of Not Guilty, however improperly that verdict may have been obtained, this court cannot, as it seems to us, direct a new trial. * * *"

B. THE JUDGMENT WAS PROPERLY ORDERED VACATED BY THE COURT OF APPEALS IN THE EXERCISE OF ITS POWER UNDER THE ALL WRITS ACT

We have shown that the judgment of acquittal was void (*supra*, pp. 27–41), and for that reason is no bar to petitioners' retrial (*supra*, pp. 41–54). It remains only to consider whether the court of appeals had power under the All Writs Act (28 U.S.C. 1651(a), *supra*, p. 3), by mandamus, to order the district court to vacate the judgment and reassign the case for trial. For, considerations of double jeopardy aside, if the court of appeals had the power, it can hardly be contended—nor do we understand petitioners to suggest—that this was not a proper case for its exercise. We submit that the authority of the court is clear.

The All Writs Act vests in this Court and all courts established by Congress the authority to issue—

> all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Among the writs thus authorized is mandamus, one of the "traditional use[s] of [which] in aid of appellate jurisdiction both at common law and in the federal courts" has been "to confine an inferior court to a lawful exercise of its prescribed jurisdiction."

Apparently the court feared that, since the records of a proper and an improper proceeding would be indistinguishable, the case would become precedent for orders for retrial after proper proceedings.

The other English case and the two Irish cases cited by the individual petitioners (F. Br. 33–34) have no relevance to this case. In each, an acquittal, the validity of which was challenged, was held valid, but in factual situations wholly different from that involved here, and for reasons not germane.

Roche v. *Evaporated Milk Association*, 319 U.S. 21, 26.[51] Although the writ is "reserved for really extraordinary causes" (*Ex parte Fahey*, 332 U.S. 258, 260) and may not be used as a substitute for appeal (*Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382), this Court has never hesitated to approve its use to invalidate an *ultra vires* act of an inferior court where the remedy by appeal, because of exceptional circumstances, is inadequate or ineffective.[52] Where, as here, the allegedly invalid order is not appealable (see 18 U.S.C. 3731), the availability of the writ has never been questioned.[53]

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[51] See also *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382; *United States Alkali Association* v. *United States*, 325 U.S. 196, 202; *De Beers Consolidated Mines* v. *United States*, 325 U.S. 212, 217; *Ex parte Peru*, 318 U.S. 578, 583; *In re National Labor Relations Board*, 304 U.S. 486, 496; *Ex parte United States*, 287 U.S. 241, 248–249; *Stratton* v. *St. Louis Southwestern Railway Co.*, 282 U.S. 10, 15–16; *Ex parte Northern Pacific Railway Co.*, 280 U.S. 142; *Ex parte United States*, 242 U.S. 27, 39–40; *Ex parte Metropolitan Water Co.*, 220 U.S. 539, 545–546; *Ex parte Harding*, 219 U.S. 363; *Virginia* v. *Paul*, 148 U.S. 107, 122–123; *Virginia* v. *Rives*, 100 U.S. 313, 323–324.

[52] Cf. *Beacon Theatres* v. *Westover*, 359 U.S. 500, 511; *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 254–260; *Ex parte Peru*, 318 U.S. 578, 584–587; *In re National Labor Relations Board*, 304 U.S. 486, 496; *Ex parte Skinner & Eddy Corporation*, 265 U.S. 86, 95–96; *Ex parte Peterson*, 253 U.S. 300, 305–306.

[53] See, *e.g.*, *Stratton* v. *St. Louis Southwestern Railway Co.*, 282 U.S. 10, 15–16 (order by single judge which only statutory three-judge court had power to make); *Ex parte Northern Pacific Railway Co.*, 280 U.S. 142 (same); *Ex parte Metropolitan Water Co.*, 220 U.S. 539, 545–546 (same); *Virginia* v. *Paul*, 148 U.S. 107, 122–123 (improper assumption by federal court of jurisdiction over state criminal prosecution). Cf. *United States* v. *Smith*, 331 U.S. 469 (order granting new trial after affirm-

While the writs authorized by the Act are such as may be "in aid of their [the issuing courts'] respective jurisdictions," it is unnecessary (in the case of an appellate court) that its jurisdiction have already attached at the time the writ is sought. No actual appeal, in other words, need then be pending. It is enough if the case lies within the court's potential appellate jurisdiction.[54] "[T]he true rule," as this Court observed in *McClellan* v. *Carland*, 217 U.S. 268, 280, "[is] that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthor-

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ance of prior order denying identical relief); *Ex parte United States*, 287 U.S. 241 (refusal to issue bench warrant following return of indictment); *Ex parte United States*, 242 U.S. 27, 39–40 (order suspending execution of minimum mandatory sentence); *Ex parte United States*, 101 F. 2d 870, 873 (C.A. 7), affirmed by an equally divided Court *sub nom. United States* v. *Stone*, 308 U.S. 519 (judgment of acquittal *non obstante veredicto*).

In *Virginia* v. *Paul*, the Court, pointing to the inability of the State to appeal if the case proceeded to trial in the federal court and resulted in acquittal (148 U.S. at 122), observed that "A stronger case for issuing a writ of mandamus can hardly be imagined" (*id.* at 123). Cf. *Maryland* v. *Soper* (*No. 1*), 270 U.S. 9, 28–30; *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 31, n. 5.

[54] *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 25; *Ex parte United States*, 287 U.S. 241, 246; *McClellan* v. *Carland*, 217 U.S. 268, 279–280; *In re Pennsylvania Co.*, 137 U.S. 451, 452; *Insurance Co.* v. *Comstock*, 16 Wall. 258, 270; *Kendall* v. *United States*, 12 Pet. 524, 621–622; *Ex parte Bradstreet*, 7 Pet. 634; *United States* v. *United States District Court*, 238 F. 2d 713, 718–719 (C.A. 4), certiorari denied *sub nom. Valley Bell Dairy Co.* v. *United States*, 352 U.S. 981; *Frankel* v. *Woodrough*, 7 F. 2d 796, 797 (C.A. 8).

ized action of the court below." Here, the court of appeals would have had jurisdiction under 28 U.S.C. 1291 to review a judgment of conviction (had the trial, permitted to run its normal course, ended in this result) and, under 18 U.S.C. 3731, to review certain kinds of orders in arrest of a judgment of conviction.[35]

The present case is thus not essentially different from *Ex parte United States,* 287 U.S. 241, where the act commanded by the writ was the issuance of a bench warrant for the arrest of one against whom an indictment, fair upon its face, had been returned. Concluding that mandamus was "[u]ndoubtedly * * * the appropriate remedy," the Court observed that the district court's refusal to issue a warrant had the effect of denying to the government its "absolute right * * * to put the accused on trial" and "f[ell] little short of a refusal to permit the enforcement of the law." 287 U.S. at 249, 250. The same consequences for the administration of justice flowed from the court's unauthorized action in the present case. As observed by the court of appeals (R. 57–58):

> If, under the circumstances disclosed by the record before us, a district judge for no good reason can halt the presentation of the Government's evidence in a criminal case and enter judgment of acquittal, the action of the grand jury in returning the indictment would be just as much flouted, and the Government fully as frustrated in the performance of its duty to

[35] During the trial, particularly its earlier stages, the trial court manifested a constant awareness of the potential appellate jurisdiction of the court of appeals, calling attention to it on many occasions (see, *e.g.*, R. 98, 121–122, 128, 132, 142, 148, 178).

> prosecute persons regularly and properly charged with crime as though the judge at the outset had refused to issue a bench warrant for the arrest of the accused. The action of the trial judge in one situation falls as little short of a refusal to permit enforcement of the criminal law as in the other.[56]

There is no merit in petitioners' contention (F. Br. 22, 42–58; S. Br. 47, 50) that, because the Congress has manifested a hostility to appellate review of verdicts favorable to defendant, the court of appeals was without power to act here. The contention incorporates its conclusion by assuming that Congress intended to insulate void, as well as valid, acquittals. However, there is no such indica-

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[56] In *United States* v. *United States District Court*, 238 F. 2d 713 (C.A. 4), certiorari denied *sub nom. Valley Bell Dairy Co.* v. *United States*, 352 U.S. 981 (mandamus to vacate orders of a district court which interfered with the conduct of a grand jury investigation), the potential jurisdiction of the appellate court was substantially more remote than in either *Ex parte United States* (287 U.S. 241) or here. In that case no indictment had been returned. The court concluded, nevertheless, that the "potential litigation involved in a grand jury investigation" lay "within [its] appellate jurisdiction." "[I]f that jurisdiction is being thwarted by erroneous exercise of power or abuse of discretion by the District Judge," the court held, "there is no more reason why this court should not exercise its power than in the case where the judge is refusing to issue a bench warrant [referring to *Ex parte United States*, *supra*]. It is argued that a grand jury might not find indictments, in which event there would be nothing with respect to which appellate jurisdiction could be exercised; but, of course, there would have been nothing with respect to which appellate jurisdiction could have been exercised if the trial of the person arrested under the bench warrant had resulted in an acquittal." 238 F. 2d at 718–719. See also *United States* v. *Malmin*, 272 Fed. 785, 796 (C.A. 3).

tion in the legislative history cited in petitioners' briefs (F. Br. 42–58; S. Br. 47–52). Indeed, the legislative history indicates that Congress never contemplated the situation presented by a void acquittal, granted in excess of the court's power, and directed its hostility only against appellate review encroaching upon the prohibition against double jeopardy. Thus, the letter of the Attorney General requesting changes in the Criminal Appeals Act, cited by the individual petitioners at page 51 of their brief, specified that right to review: [57]

> should, of course, be limited to cases in which there has not been a verdict in favor of the defendant, for in such an instance the rule against double jeopardy would conclusively bar the Government against securing a review.

Where, as we have shown, double jeopardy is not a bar because the judgment of acquittal was a nullity, the congressional attitude was not hostile.

For these reasons, we submit, the court of appeals, in the exercise of its supervisory control of the administration of justice in the courts of its circuit, had the unquestionable authority, in the exceptional circumstances shown by this record, to direct the district court, by mandamus, to vacate its *ultra vires* judgment. Cf. *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259–260.[58]

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[57] Letter, Attorney General to Speaker of the House, printed in H. Rep. No. 45, 77th Cong., 1st Sess., p. 2 (1941).

[58] The court of appeals, while noting that the government, in its application for mandamus, had not asked it to do so (R. 58), ordered nevertheless that the case be reassigned for trial before another judge (R. 59). The reason for the direction

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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was that the court (R. 58–59) "d[id] not see how a judge who has unnecessarily taken it upon himself to cross-examine witnesses not only extensively but also sharply can either listen to their testimony reflectively or weigh their testimony dispassionately."

The corporate petitioner, in its petition for certiorari, challenged the authority of the court of appeals to make such an order (Pet. 19–20; Question 7, Pet. 4). Although this Court, in granting certiorari, did not limit the writ, the contention has not been renewed. We assume, accordingly, that it has been abandoned. In any event, the inclusion of such a direction in the order granting mandamus was a clearly reasonable incident of the order and one which the court had authority to make in the exercise of its supervisory control of the administration of justice in its circuit. See *La Buy* v. *Howes Leather Co.*, *supra*. This Court, in comparable situations, has issued similar directions. See, *e.g.*, *Offutt* v. *United States*, 348 U.S. 11, 18; *Calvaresi* v. *United States*, 348 U.S. 961; *Cooke* v. *United States*, 267 U.S. 517, 539.

APPENDIX

THE TRIAL JUDGE'S STATEMENT TO THE JURY ON THE OCCASION OF HIS ORDERING THE RETURN OF VERDICTS OF ACQUITTAL (R. 572–576)

The COURT: Mr. Foreman and Members of the Jury, before I say anything else, let me make it absolutely clear that counsel for the defendants as well as the Court are persuaded that neither the United States Attorney nor either of his assistants consciously or deliberately violated any canon with which they were familiar. They were acting subjectively in good faith, and I do not mean at any stage of the remarks I am about to make to criticize them in the sense that I believe that they were conscious wrongdoers.

On the other hand, a criminal prosecution is the most solemn proceeding which takes place in a court, and one of the most solemn activities with which man could be concerned on earth. The standards of a criminal prosecution in the United States require a constant awareness of the rights and liberties guaranteed by the United States Constitution, and a constant sensitivity with respect to the value of an open trial conducted with a full protection of the rights of any individual or any corporation summoned to answer a criminal charge.

In the case before you there have been a number of difficult problems, and I have no question that you have been presented with witnesses who were the best that the government could offer, but they were witnesses who on the stand showed a lamentable lack of

awareness or lack of capacity in connection with their testimonial obligations.

Frequently during the trial of this case I have had to do what I never did before in eighteen and one-half years, remind the witnesses of the solemnity of their function, and the necessity that they should recall accurately and state accurately the testimony which they were giving in matters of the utmost significance.

Were I not engaged in such a serious set of remarks to you, I would be tempted to rest upon a story which Chief Justice Wilkins told at the Judicial Conference, somewhat different from the one that I recited to you the other day. He referred to a case tried by Judge Otis Lord of the Superior Court of the Commonwealth of Massachusetts in the middle of the 19th century, and he said that after the most fluctuating kind of testimony by witnesses in that criminal case Justice Lord in addressing the jury said, "I think it would be sufficient if I instructed you that if you believe the witnesses for the government you will convict the prisoner; if you believe the witnesses for the prisoner, you will acquit him; if, like myself, you do not believe either of them you will then acquit the prisoner because the government has the burden of proof beyond a reasonable doubt."

And though that story may seem to you to be humorous, I think you will also say that it has considerable application to the difficulties which we have faced in this case.

That is not to say that the difficulties were created by the United States Attorney or his assistants. They were faced by them. It is in the atmosphere of this fluctuating testimony that yesterday afternoon we had testimony on a most vital point given by Mr. Rosenholm. You cannot fully appreciate how vital, because you haven't read the text of the indictment and I have not hitherto had any occasion to discuss with

you the problem of conspiracy, which is one of the essential elements in a part of this indictment. And you can't know, as I do, that the prosecution was endeavoring to show that a lawyer, together with others not named as defendants, together with the defendants, conspired to defraud the United States, that in this connection the admissibility of the testimony depended to a very considerable extent upon the date of an alleged conference in which the attorney participated. But you did hear that that date was given by this witness, Mr. Rosenholm, on the stand yesterday, and that I declared a recess yesterday afternoon in order that the government might be fully prepared to lay a foundation for the admissibility of the testimony that it relied upon with respect to this alleged conspiratorial conference.

During the recess, and without in any way being conscious of a potential violation of any canon of ethics or any rule or principle, the Assistant United States Attorneys in this case admittedly conferred with this witness who was on the stand, and the conference with him took place either in the offices of the United States Attorney or in some similar place. It took place this morning before court, not under the supervision of a judge, and without the presence of the defendants or counsel for the defendants.

In this situation the witness took the stand this morning and on this very vital point gave an altered version in which the date now given becomes quite significant and has a connotation and importance which the date he gave yesterday did not have.

He is a witness who already has shown either a lamentable lack of memory or an extraordinary power of inventiveness, as you will recall in connection with the cards where he gave a whole series of answers which he withdrew.

With due regard for the principles of justice under law, I must bear in mind not only what may be correct, but what is fair. In our constitutional system, under our jurisprudence, many things which are true are not allowed to be shown. Examples are a confession extorted by physical coercion; such a confession is not admissible although it may be perfectly correct and the defendant may be guilty. Likewise, information procured by an unlawful search and seizure may be perfectly true and the defendant may be guilty; nonetheless it is well settled that no conviction can be based lawfully upon information unconstitutionally procured by an unreasonable search or seizure.

These principles illustrate the sensitivity of American courts to fair play in connection with every aspect of the criminal law. It is not the duty of a court to see that every guilty man is punished. It is the duty of a court to see that every man gets a fair trial. The highest public interest is not the punishment of the wicked, but the establishment and maintenance of justice under law.

VERDICTS OF ACQUITTAL

Bearing in mind those principles, and responding to the motions of acquittal made by counsel for the individual defendants and the corporate defendant, I direct you at this stage to return the verdicts of acquittal with respect to each of the individuals and with respect to the corporation.

(The Court then heard requests of Jurors to be excused.)

The Court: The defendants will stand. (The defendants complied.) You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free.

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